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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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ALBERTO MONTELONGO **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-16-00001-CR
TRIAL COURT CAUSE NUMBER 20150D02224
243rd DISTRICT COURT OF EL PASO COUNTY, TEXAS

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The State does not request oral argument.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Alberto Montelongo (hereinafter Montelongo), was indicted for one count of attempted capital murder, five counts of aggravated assault with a deadly weapon, and one count of continuous violence against the family. (CR at 9-15).[1] A jury found Montelongo guilty of attempted capital murder and continuous violence against the family. (RR6 at 169-70); (CR at 232-35).[2] The same jury assessed Montelongo's punishment at confinement for 99 years and a $10,000 fine for the attempted capital murder and confinement for 10 years and a $10,000 fine for the continuous violence against the family. (RR7 at 131-32); (CR at 248-49). The trial court sentenced Montelongo in accordance with the jury's verdicts. (RR7 at 133-34); (CR at 251-54).

Montelongo timely filed a motion for new trial. (CR at 263-74). No hearing was held on the motion, and no oral or written order on the motion was entered by the trial court; therefore, the motion was deemed denied by operation of law. *See* TEX. R. APP. P. 21.8(a), (c). Montelongo thereafter timely filed notice of

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[1] Throughout this brief, references to the appellate record will be made as follows: references to the original clerk's record filed on January 27, 2016, will be made as "CR" and page number, references to the second supplemental clerk's record filed on November 30, 2016, will be made as "2Supp. CR" and page number, and references to the eight-volume reporter's record will be made as "RR" and volume and page number.

[2] Montelongo was not tried on the five counts of aggravated assault, and those charges were ultimately dismissed. (CR at 258).

appeal. (CR at 277, 282).

On June 27, 2016, Montelongo filed a motion requesting that the Court of Appeals abate the appeal and remand the case to the trial court to conduct a hearing on his motion for new trial. *See* (documents in Court of Appeals' file). Upon the request of the Court of Appeals, the State filed a response on July 7, 2016. *See* (documents in Court of Appeals' file). And on July 22, 2016, the Court of Appeals denied Montelongo's motion to abate the appeal. *See* (documents in Court of Appeals' file).

On August 31, 2018, the Eighth Court of Appeals affirmed Montelongo's convictions and sentences. *See Montelongo v. State*, No. 08-16-00001-CR, 2018 WL 4178520 (Tex.App.–El Paso, Aug. 31, 2018, pet. granted)(not designated for publication). Relevant to this proceeding, the Court of Appeals held that Montelongo failed to preserve for appellate review his complaint that the trial court erred in failing to conduct a hearing on his motion for new trial. *See Montelongo v. State*, 2018 WL 4178520, at *2-3. Montelongo filed a motion for rehearing, which was denied by the Court of Appeals on January 9, 2019. *See* (documents in Court of Appeals' file).

On March 14, 2019, Montelongo filed in this Court a petition for discretionary review (PDR) raising a single issue: "The 8th Court of Appeals erred

in finding that Appellant waived his right to a hearing on a properly presented and filed motion for new trial." On May 8, 2019, this Court granted Montelongo's PDR with the notation that oral argument will not be permitted. Montelongo filed his PDR brief on June 25, 2019.

STATEMENT OF FACTS

The offense

The facts of the offense are set out in the Court of Appeals' opinion. *See Montelongo v. State*, 2018 WL 4178520, at *1-2.

The motion for new trial

The trial court sentenced Montelongo in open court on September 30, 2015. (RR7 at 1, 133-34). Montelongo timely filed his motion for new trial on October 30, 2015. (CR at 263-74); *see also* TEX. R. APP. P. 21.4(a) (providing that a defendant may file a motion for new trial no later than 30 days after the trial court imposes sentence in open court). In the motion, Montelongo raised four grounds for relief: (1) that the jury's verdict was contrary to the law and evidence; (2) that he was denied the effective assistance of counsel; (3) that he was deprived of his right to due process, his right to trial by an impartial jury, and his right to counsel due to the actions of the trial court; and (4) the interest of justice. (CR at 263-74).

On November 19, 2015 (50 days after Montelongo was sentenced in open court), the trial court entered an order setting the motion for new trial for hearing on December 8, 2015. (2Supp. CR at 5-7). But on November 23, 2015 (54 days after Montelongo was sentenced in open court), the trial court entered an order cancelling the December 8 hearing. (2Supp. CR at 8-10 – the trial court's order

cancelling the hearing and fax transmission logs showing that the order was faxed to both Montelongo's trial and appellate counsel on that date).[3] Montelongo did not object to the trial court's cancellation of the hearing or in any other way attempt or make any effort to have the hearing rescheduled. The motion for new trial was then deemed denied by operation of law on December 14, 2015. *See* TEX. R. APP. P. 21.8(a), (c) (providing that a motion for new trial not ruled on within 75 days after sentencing in open court is deemed denied).

The appeal

In his first issue presented to the Court of Appeals, Montelongo asserted that the trial court abused its discretion by failing to conduct a hearing on his motion for new trial. The State countered that: (1) Montelongo had waived any right to a hearing on his motion for new trial by failing to object to the trial court's cancellation of the December 8 hearing or otherwise attempt to have the hearing rescheduled within the 75-day window for ruling on the motion for new trial; and (2) Montelongo had failed to show that he was entitled to a hearing on his motion for new trial, such that he further failed to show that the trial court erred or abused

[3] In his PDR brief, Montelongo speculates that the trial court cancelled the hearing to prevent the development of any evidence of the court's alleged "improper behavior." *See* (Montelongo's PDR brief at p. 41); *see also* (Montelongo's PDR brief at p. 43 – where Montelongo asserts that the trial court engaged in "gamesmanship" to avoid ruling on the motion for new trial). There is absolutely no support in the record for these assertions, as the record is wholly silent as to the reason(s) for the court's cancellation of the hearing.

its discretion by failing to conduct any hearing on the motion.

The Court of Appeals agreed with the State's first argument, holding that Montelongo failed to preserve for appellate review his complaint that the trial court erred in failing to conduct a hearing on the motion for new trial. Specifically, the Court of Appeals first held that, "When a motion for new trial is presented to the trial court, the burden of ensuring that the hearing thereon is set for a date within the trial court's jurisdiction is properly placed on the party presenting the motion, not on the trial judge." *See Montelongo v. State*, 2018 WL 4178520, at *2, *citing Oestrick v. State*, 939 S.W.2d 232, 235-36 (Tex.App.–Austin 1997, pet. ref'd); *and Crowell v. State*, 949 S.W.2d 37, 38 (Tex.App.–San Antonio 1997, no pet.). The Court further held that, "In the absence of a record showing [Montelongo's] efforts to reschedule the hearing on his motion for new trial, he cannot complain about the overruling of his motion by operation of law," and that because Montelongo "did not obtain a ruling on his motion for new trial and did not object to a lack of a ruling on the motion," he "failed to preserve this complaint for our review." *See Montelongo v. State*, 2018 WL 4178520, at *2-3, *citing, e.g., Baker v. State*, 956 S.W.2d 19, 24-25 (Tex.Crim.App. 1997); *Tello v. State*, 138 S.W.3d 487, 496 (Tex.App.–Houston [14th Dist.] 2004), *aff'd*, 180 S.W.3d 150 (Tex.Crim.App. 2005); *and Johnson v.*

State, 925 S.W.2d 745, 748 (Tex.App.–Fort Worth 1996, pet. ref'd). Based on this finding of waiver, the Court of Appeals overruled Montelongo's first issue without reaching the question of whether he was even entitled to a hearing on his motion in the first place. *See Montelongo v. State*, 2018 WL 4178520, at *2-3.

SUMMARY OF THE STATE'S ARGUMENTS

When, as in this case, a trial court sets a hearing on a defendant's motion for new trial: (1) the burden is on the defendant to ensure that the hearing is set and conducted within the 75-day window for ruling on the motion; (2) the burden remains on the defendant (and not the trial court) to ensure that any timely-set hearing that is interrupted or cancelled is subsequently rescheduled or reconvened within that 75-day window; and (3) a defendant who fails to object to an untimely-set hearing, or fails to object and/or take any steps to obtain a timely rescheduling of a cancelled or interrupted hearing (or fails to present a record showing what attempts were made to timely reschedule the hearing), waives any complaint that the trial court failed to conduct a hearing on the motion for new trial.

In this case, the trial court initially set a hearing on Montelongo's motion for new trial within the 75-day window for ruling on the motion, but then (still well within that 75-day window) cancelled the hearing. Montelongo thereafter did nothing and silently allowed the 75-day window to expire. As such, the Court of Appeals correctly held that by failing to take any steps whatsoever to timely reschedule the cancelled hearing, Montelongo failed to preserve for appellate review any complaint that the trial court erred or abused its discretion by failing to conduct a hearing on his motion for new trial.

STATE'S REPLY TO MONTELONGO'S ISSUE FOR REVIEW

The Court of Appeals correctly held that the burden was on Montelongo, and not the trial court, to ensure that a hearing on his motion for new trial was timely set and conducted and that Montelongo, by failing to object to the trial court's cancellation of the hearing or otherwise make any attempt to have the hearing rescheduled within the 75-day window for ruling on the motion, failed to preserve for appellate review his complaint that the trial court improperly failed to conduct a hearing on his motion for new trial.

ARGUMENT AND AUTHORITIES

I. The right to a hearing on a motion for new trial

It is well settled that the right to a hearing on a motion for new trial is not absolute, even if the motion raises matters not determinable from the trial record. *See, e.g., Rozell v. State*, 176 S.W.3d 228, 230 (Tex.Crim.App. 2005); *Reyes v. State*, 849 S.W.2d 812, 815-16 (Tex.Crim.App. 1993). This Court has recognized three distinct requirements the defendant must satisfy in order to trigger his right to a hearing:

> (1) the defendant must timely file the motion with supporting affidavits that demonstrate reasonable grounds for believing that some error has occurred;
>
> (2) the defendant must timely present the motion to the trial court; and
>
> (3) in addition to timely filing and presenting the motion to the trial court, the defendant must put the trial court on actual notice that a hearing is desired by making a specific request for a hearing.

See Rozell v. State, 176 S.W.3d at 230 (and cases cited therein).

II. By failing to object to the trial court's cancellation of the new-trial hearing, or otherwise attempt or make any effort to have the hearing rescheduled within the 75-day window for ruling on the motion, Montelongo failed to preserve for appellate review his complaint that the trial court improperly failed to conduct a hearing on his motion for new trial.

The State does not dispute that Montelongo timely filed his motion for new trial and that he presented it to the trial court.[4] But even though he requested a hearing in the prayer for relief in the motion, Montelongo thereafter failed to preserve for appellate review any complaint regarding the trial court's failure to hold a hearing by failing to object to the trial court's cancellation of the December 8, 2015, hearing date or otherwise take any steps to request, obtain, or ensure a hearing date within the 75-day window for ruling on the motion (which window expired on December 14, 2015). Simply, by failing to so object or otherwise take any steps to reschedule the hearing within the 75-day window for ruling after the cancellation of the initial hearing date, Montelongo failed to preserve for appellate review any complaint that the trial court failed to conduct a hearing on his motion.

The courts of this State, including this Court, have consistently reached this

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[4] That the trial court initially set the motion for a hearing shows that the court was aware of the motion for new trial, thus satisfying the presentment requirement. *See Carranza v. State*, 960 S.W.2d 76, 79-80 (Tex.Crim.App. 1998)(recognizing that a hearing date set on the trial court's docket shows that the motion was presented to the trial court).

conclusion in analogous, if not substantially indistinguishable, procedural and factual contexts. First, in *Baker v. State*, the defendant timely filed and presented a motion for new trial, but the trial court set the motion for hearing–and ultimately heard the motion–on a date outside the 75-day window for ruling on the motion. *See Baker v. State*, 956 S.W.2d 19, 24 (Tex.Crim.App. 1997). The defendant did not object to the setting of the hearing, or to the actual hearing of the motion, outside of the 75-day window. *See id.* As a result, the motion for new trial was denied by operation of law at the expiration of that 75-day window (before the hearing was conducted). *See* TEX. R. APP. P. 21.8(a), (c). On appeal, the defendant complained that the trial court erred in failing to conduct a timely hearing on the motion, but this Court rejected the complaint, holding that, "By failing to object to the untimely setting, Appellant has failed to preserve his complaint that the trial judge should have held a timely hearing." *See Baker v. State*, 956 S.W.2d at 24-25; *see also Crowell v. State*, 949 S.W.2d 37, 38 (Tex.App.–San Antonio 1997, no pet.)(citing *Baker* and similarly holding that even after timely filing and presenting to the trial court a motion for new trial, the burden of ensuring a timely hearing thereon rests on the defendant, and the failure of the defendant to object to the untimely setting of a hearing results in a waiver of any complaint that the trial court failed to conduct a timely hearing); *Bacey v.*

State, 990 S.W.2d 319, 335 (Tex.App.–Texarkana 1999, pet. ref'd)(citing *Baker* and *Crowell* and similarly holding that the burden of ensuring a timely hearing on a motion for new trial rests on the defendant, and the failure of the defendant to object or otherwise call the trial court's attention to its failure to schedule a timely hearing results in a waiver of any complaint that the trial court failed to conduct a timely hearing); *Lara v. State*, No. 01-15-00472-CR, 2016 WL 2342769, at *2-4 (Tex.App.–Houston [1st Dist.], May 3, 2016, no pet.)(mem. op.)(not designated for publication)(citing *Baker*, *Crowell*, and *Bacey* and likewise holding that after receiving notice that the hearing on his motion for new trial was set for a date outside the 75-day window, the defendant's failure to "object or otherwise bring the error to the trial court's attention" resulted in a waiver of any complaint concerning the trial court's failure to hold a hearing on the motion for new trial).

A second analogous situation was addressed in *Johnson v. State*, 925 S.W.2d 745 (Tex.App.–Fort Worth 1996, pet. ref'd). In that case, the trial court set and convened a hearing on the defendant's motion for new trial "a full month" before the expiration of the 75-day window for ruling on the motion. *See Johnson v. State*, 925 S.W.2d at 747-48. However, the hearing was interrupted before its conclusion by a bomb threat and was not thereafter resumed, rescheduled, or reconvened before the expiration of the 75-day window. *See id.* As a result, the

motion for new trial was denied by operation of law at the expiration of that 75-day window. *See id.* at 747-49; TEX. R. APP. P. 21.8(a), (c).

In rejecting the defendant's claim that the 75-day rule should be suspended in that case, the Second Court of Appeals held that even if the rule could be suspended, the burden was on the defendant to provide evidence of his efforts to get the hearing rescheduled or resumed within the 75-day window. *See Johnson v. State*, 925 S.W.2d at 748. And because the defendant failed to present any evidence that he attempted to reschedule the hearing within the 75-day window, even though he had "a full month" to do so after the bomb threat, no good cause was shown for the suspension of the 75-day rule. *See id.* at 748-49.

Finally, *Tello v. State*, 138 S.W.3d 487 (Tex.App.–Houston [14th Dist.] 2004), *aff'd*, 180 S.W.3d 150 (Tex.Crim.App. 2005), presents a remarkably similar, if not substantially indistinguishable, factual and procedural situation. In that case, the trial court set the defendant's motion for new trial for a hearing on a particular date within the 75-day window for ruling on the motion, but the court later cancelled the hearing. *See Tello v. State*, 138 S.W.3d at 496. The defendant thereafter made no effort to reschedule the cancelled hearing. *See id.*

On appeal, the defendant (like Montelongo in this case) claimed that the trial court should have reset the motion for new trial for a hearing. *See id.* The

Fourteenth Court of Appeals, citing *Johnson v. State, supra*, rejected that claim:

> Although appellant complains in his third point of error that the trial court should have reset his motion for new trial for a hearing, appellant did not develop a record of his efforts to reschedule the hearing. In the absence of a record showing appellant's efforts to reschedule the hearing on his motion for new trial, he cannot complain about the overruling of his motion for new trial by operation of law. *See, e.g., Johnson v. State*, 925 S.W.2d 745, 748 (Tex.App.–Fort Worth 1996, pet. ref'd) (stating that it was incumbent upon defendant to "develop some record, before the expiration of the court's jurisdiction, which demonstrated his efforts to reschedule the hearing" on the defendant's motion for new trial).

Tello v. State, 138 S.W.3d at 496.[5]

A survey of these cases thus demonstrates that if the trial court actually sets a hearing on a defendant's motion for new trial (as the trial court in this case did): (1) the burden is on the defendant to ensure that the hearing is set and conducted within the 75-day window for ruling on the motion; (2) the burden remains on the defendant (and not the trial court) to ensure that any such timely-set hearing that is interrupted or cancelled is subsequently rescheduled or reconvened within that 75-

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[5] In his PDR brief, Montelongo, in an attempt to distinguish *Tello*, asserts that the Fourteenth Court of Appeals in *Tello* did not find any waiver and instead overruled the defendant's point of error because the motion for new trial and supporting affidavits did not provide a reasonable basis to conclude that trial counsel was ineffective. *See* (Montelongo's PDR brief at p. 42). A careful reading of the *Tello* opinion, however, as demonstrated by the passage quoted above, shows that the Fourteenth Court did in fact first hold that the defendant had waived his complaint regarding the trial court's failure to conduct a hearing on his motion for new trial, and the subsequent holding that the motion and supporting affidavits were insufficient to demonstrate his entitlement to relief was merely an alternative and additional basis for rejecting the complaint. *See Tello v. State*, 138 S.W.3d at 496.

day window; and (3) a defendant who fails to object to an untimely-set hearing, or fails to object and/or take any steps to obtain a timely rescheduling of a cancelled or interrupted hearing (or fails to present a record showing what attempts were made to timely reschedule the hearing), waives any complaint that the trial court failed to conduct a hearing on the motion for new trial. *See Tello v. State*, 138 S.W.3d at 496; *see also Baker v. State*, 956 S.W.2d at 24-25; *Bacey v. State*, 990 S.W.2d at 335; *Crowell v. State*, 949 S.W.2d at 38; *Lara v. State*, 2016 WL 2342769, at *2-4; *cf. Johnson v. State*, 925 S.W.2d at 747-49. And that is exactly what the Eighth Court of Appeals correctly held in this case.

As discussed above, the record in this case shows that when, on November 23, 2015, the trial court cancelled the December 8, 2015, hearing on Montelongo's motion for new trial (and faxed notice of such cancellation to Montelongo's trial and appellate counsel that same date), Montelongo still had 21 days to at least try to get the hearing rescheduled before the expiration of the 75-day window for ruling on the motion, which was to expire on December 14, 2015. Instead, Montelongo did nothing and silently allowed the 75-day window to expire. Based on the above-cited authorities, Montelongo thus failed in his burden of ensuring that a hearing was timely set and conducted, such that he further failed to preserve for appellate review any complaint that the trial court erred in failing to conduct a

timely hearing on his motion for new trial.[6] Montelongo has thus failed to show that the Eighth Court of Appeals erred in holding that he failed to preserve his complaint for appellate review, and his sole ground for review should be overruled.

III. The actual merits of Montelongo's claim that the trial court improperly failed to conduct a hearing on his motion for new trial, as well as the merits of the motion for new trial itself, are not issues properly before this Court in this PDR proceeding.

Montelongo directs the majority of his arguments in his PDR brief to: (1) the actual merits of his claim that he was entitled to a hearing on his motion for new trial; and (2) the merits of the underlying claims raised in his motion for new trial. *See* (Montelongo's PDR brief at p. 28-44). But these issues are not properly before this Court at this time.

The Texas Rules of Appellate Procedure provide that on petition by a party, this Court may review a court of appeals' "decision" in a criminal case. *See* TEX.

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[6] The State does not disagree with Montelongo's assertion that, if his motion for new trial and supporting affidavits, along with his request for a hearing, were sufficient to require a hearing on the motion (which the State did not concede in the Court of Appeals and does not here concede, and which issue is not presently before this Court, as will be discussed in more detail below), his presentment of the motion to the trial court was sufficient–with no further action on Montelongo's part required–to invoke the trial court's duty to set a hearing on the motion. *See* (Montelongo's PDR brief at p. 28-29, 39, 42), *citing, e.g., Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App. 1993), *and Vera v. State*, 868 S.W.2d 433, 435 (Tex.App.–San Antonio 1994, no pet.). But as the cases cited above demonstrate, once the trial court initially set a hearing in this case, the burden then fell squarely on Montelongo to ensure that that hearing was timely held and concluded.

R. APP. P. 66.1, 68.1. The petition filed by Montelongo in this case raised a single ground for review complaining of the Court of Appeals' holding that Montelongo failed to preserve for appellate review his complaint regarding the trial court's failure to conduct a hearing on his motion for new trial. And this finding of waiver was the sole ground upon which review was granted by this Court. Because Montelongo did not seek review of any decision regarding the actual merits of his claim that the trial court erred in failing to conduct a hearing on his motion for new trial, and because this Court did not grant review of any decision on the actual merits of any such claim, the issues of whether Montelongo was actually entitled to a hearing on his motion for new trial and whether the trial court erred or abused its discretion by failing to conduct a hearing on the motion are not presently before this Court.

Further in this regard, the Court of Appeals did not purport to address the actual merits of Montelongo's claim that the trial court erred in failing to conduct a hearing on the motion for new trial. As noted above, the Court of Appeals simply held that Montelongo failed to preserve that claim for appellate review, and the Court did not thereafter reach or address the actual merits of that issue. *See Montelongo v. State*, 2018 WL 4178520, at *2-3. As such, there is no "decision" from the Court of Appeals on the issues of whether Montelongo was actually

entitled to a hearing on his motion for new trial and whether the trial court erroneously failed to conduct any such hearing. *See Lara v. State*, 2016 WL 2342769, at *4 n. 5 (explaining that by holding the defendant waived his complaint regarding the trial court's failure to conduct a timely hearing on his motion for new trial, the court of appeals need not–and did not–address the merits of whether the defendant was actually entitled to a hearing on his motion).

For these reasons, this Court at this time need not, and should not, reach or address the actual merits of Montelongo's underlying appellate claim that the trial court erred or abused its discretion by failing to conduct a hearing on his motion for new trial.

PRAYER

WHEREFORE, the State prays that this Court overrule Montelongo's issue presented for review and affirm the judgment of the Eighth Court of Appeals.[7]

Respectfully submitted,

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[7] In the event this Court determines that the Court of Appeals erred in holding that Montelongo failed to preserve for appellate review his claim that the trial court erred in failing to conduct a hearing on his motion for new trial, the proper remedy is not–as Montelongo requests in his PDR brief–that his convictions and sentences be reversed and that he be granted a new trial, or that the case be abated and remanded to the trial court for a hearing on his motion for new trial. *See* (Montelongo's PDR brief at p. 44). Rather, the proper remedy would be to reverse the judgment of the Court of Appeals and remand the case back to the Court of Appeals to address in the first instance the merits of Montelongo's complaint regarding the trial court's failure to conduct a hearing on his motion for new trial. *See Burt v. State*, 396 S.W.3d 574, 579 (Tex.Crim.App. 2013)("Because the court of appeals found that appellant's...issues had not been preserved and therefore did not reach their merits, we reverse the judgment of the court of appeals and remand this cause to that court to address the merits of appellant's complaints...").

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 16, contains 4,047 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Tom A. Darnold
TOM A. DARNOLD

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that a copy of the foregoing brief was sent by e-mail by utilizing the E-serve system on July 12, 2019, to appellant's attorney: Joe A. Spencer, at joe@joespencerlaw.com.

(2) The undersigned also does hereby certify that a copy of the foregoing brief was sent by e-mail by utilizing the E-serve system on July 12, 2019, to the State Prosecuting Attorney: information@SPA.texas.gov.

/s/ Tom A. Darnold
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